IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, Plaintiff, v. ENRON CORPORATION, ANDREW S. FASTOW, KENNETH L. LAY and JEFFREY J. SKILLING, Defendants.	Civil Action No. 01-CV-3624 (Consolidated) Judge Melinda Harmon

REPLY MEMORANDUM OF LAW OF THE FLORIDA STATE BOARD OF ADMINISTRATION AND THE NEW YORK CITY PENSION FUNDS IN SUPPORT OF THEIR MOTION FOR APPOINTMENT AS CO-LEAD PLAINTIFFS

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PRELIMINARY STATEMENT

Out of the flurry of motions filed, three principal applicants for appointment of lead plaintiff have emerged: (1) the Florida State Board of Administration ("FSBA") and the New York City Pension Funds (the "NYC Funds") (sometimes collectively referred to as "the Funds"); (2) the State Retirement Systems Group (the "State Group"); and (3) the Regents of the University of California (the "Regents").[1] The financial interest of the FSBA and the NYC Funds in this litigation, \$443.9 million, substantially exceeds the financial interests of the State Group (\$330.7 million) or the Regents (\$144 million). Because they have the largest financial interest, the Funds are entitled to the statutory presumption that they should be selected as co-lead plaintiffs.[2] See 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

Recognizing that their own applications must fail in the face of the Funds' statutory presumption of adequacy, the State Group and the Regents devote substantially all of their opposition papers to attacks upon the FSBA, and barely mention the NYC Funds. As demonstrated in detail below, these attempts to discredit the ability of the FSBA and the NYC Funds to direct this litigation are groundless and should be rejected for the following reasons:

- the FSBA and the NYC Funds, which have a pre-existing relationship, are a cohesive, effectively managed, client-controlled partnership.[3]

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1 The Regents' application to serve as sole lead plaintiff was first disclosed in its opposition brief, which was not timely served, in violation of Judge Rosenthal's Order of January 8, 2002. The Regents' papers strongly suggest that their application is lawyer-driven. See Point V, infra.

2 The State Group acknowledges that the FSBA and the NYC Funds are the presumptive most adequate plaintiffs to direct this litigation. State Group Opp. Mem. at 1-2.

3 The FSBA and the NYC Funds are both active members of the Council of Institutional Investors, and their respective general counsel are each active members of the National Association of Public Pension Attorneys. In connection with their membership in these organizations, the FSBA and the NYC Funds have worked together on corporate governance

- The "professional plaintiff" limitations of the Private Securities Litigation Reform Act of 1995 ("PSLRA") were not intended to apply to institutional investors such as the FSBA and the NYC Funds.[4] Indeed, the experience of the FSBA and the NYC Funds in directing complex class action litigation is an important benefit that no other applicant can confer on the class.

- The State Group and the Regents have failed to submit the "proof" required by the PSLRA to rebut the presumption of the Funds' adequacy. The attacks on the FSBA's adequacy and typicality are premised on speculation and conjecture, and are flawed on their face.

The FSBA and the NYC Funds have already demonstrated their ability to lead this case effectively through the diligent, responsible and professional manner by which they obtained an order directing, inter alia, the preservation of Arthur Andersen documents.[5] The Funds have also demonstrated through their previously submitted sworn statements that they can best ensure that this litigation is client-directed. Moreover, the Funds have evidenced their commitment to obtaining the greatest net recovery to the class through their arms-length negotiation of a highly favorable retainer agreement.[6] Nothing in the opposition papers of the other lead plaintiff applicants in any way diminishes the presumptive and actual adequacy of the FSBA and the NYC Funds to lead this important litigation. Accordingly, the FSBA and the NYC Funds

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issues. See Supplemental Declaration of Phyllis Taylor dated January 28, 2002 ("Taylor 1/28/02 Decl.") (Exhibit A), the Affidavit of Linda Lettera dated January 25, 2002 ("Lettera 1/25/02 Aff.") (Exhibit B), and discussion at Point II, infra. The exhibits are being submitted in a separate compendium.

4 See the Submission of the State of Wisconsin Investment Board on the Lead Plaintiff Application of the Florida State Board of Administration and the New York City Pension Funds dated January 28, 2002.

5 In addition, on January 22, 2002, the FSBA filed a motion in the Enron bankruptcy proceedings seeking, inter alia, a document preservation order. On January 25, 2002, the Bankruptcy Court issued an Order to Preserve Documents of Estates.

6 If requested, a copy of the retainer will be submitted under seal for the Court's in camera review.

respectfully request that the Court appoint them as co-lead plaintiffs.

ARGUMENT

I. NEITHER THE STATE GROUP NOR THE REGENTS DISPUTES THE FACT THAT THE FSBA AND THE NYC FUNDS HAVE THE LARGEST FINANCIAL INTEREST IN THE RELIEF SOUGHT BY THE CLASS

The submissions filed to date plainly establish that the FSBA and the NYC Funds, with collective losses from their class period investments in Enron securities of $443.9 million, have by far the largest financial interest in the relief sought by the class.[7] Neither the State Group nor the Regents disputes this fundamental fact.

As demonstrated in detail below, the State Group and the Regents have failed to submit any "proof" that the FSBA and the NYC Funds are neither typical nor adequate representatives of the class. Accordingly, the motion of the FSBA and the NYC Funds for appointment as co-lead plaintiffs should be granted. See 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II); Waste Management, 128 F. Supp. 2d at 410-11; Gluck v. Cellstar Corp., 976 F. Supp. 542, 543-45 (N.D. Tex. 1997).

II. THE FSBA AND THE NYC FUNDS CONSTITUTE A COHESIVE "GROUP" WITHIN THE MEANING OF THE PSLRA

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[7] In In re Waste Management, Inc. Sec. Litig., 128 F. Supp. 2d 401, 409, n.4 (S.D. Tex. 2000) ("Waste Management"), this Court identified four factors relevant to the calculation of "largest financial interest": (1) the number of shares purchased; (2) the number of net shares purchased; (3) the total net funds expended by the plaintiffs during the class period; and (4) the approximate losses suffered by the plaintiffs. Applying these factors to the class period transactions of the FSBA and the NYC Funds, which are already part of the record, confirms that they have the largest financial interest. With respect to Enron common stock, the FSBA and the NYC Funds (1) purchased 11,558,473 shares; (2) purchased 10,938,159 net shares; (3) expended total net funds of $409,024,392.17; and (4) suffered approximate losses of $408,736,636. With respect to Enron bonds, the FSBA and the NYC Funds (1) purchased $45,035,000 in face amount of bonds, which is also the net amount of bonds purchased; (2) expended total net funds of $43,286,142; and (3) suffered approximate losses of $35,252,774.

A. The Court May Appoint A Small Group to Serve as Lead Plaintiff So Long As the Group's Appointment Will Further the Objectives of the PSLRA

The plain language of the PSLRA allows the Court to designate more than one person as a lead plaintiff: "[T]he court . . . shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members . . ." 15 U.S.C. § 78u-4(a)(3)(B)(i). See also 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I) ("the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this chapter is the person or group of persons . . .").

As this Court has previously recognized, district courts across the country have divergent views on exactly what type of group will satisfy the statute.[8] This Court has rejected the view that "automatic arbitrary restrictions, such as a specific number of Lead Plaintiffs or a specific common connection" should be applied in all class actions under the PSLRA, finding instead that "the circumstances of each suit must be considered in determining appropriate restraints on random aggregation by counsel." Waste Management, 128 F. Supp. 2d at 413. Thus, while other courts that have confronted the issue have identified various factors that inform a court's analysis of adequacy – the number of group members, the perceived reasons for the group's aggregation, the cohesiveness of the group, the group's means of communication, and the extent of the group members' prior relationship – it is clear that in this Court's view such factors cannot be applied with the precision of a bright-line test. Id.

There is one theme that unites the different considerations: the overarching quest, mandated by the text of the PSLRA and its legislative history, to decide the question in a way that furthers the objectives of the Act. The foregoing factors should be used to inform a court's

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[8] See, e.g., Waste Management, 128 F. Supp. 2d at 412-13; In re NCI Buildings Systems, Inc. Sec. Litig., Case No. H-01-128, Order at 11-14 (S.D. Tex. Dec. 28, 2001).

analysis on the ultimate question of whether the applicants are collectively the most capable of adequately representing the class and whether their appointment will further or hinder the purposes of the Act. See Waste Management, 128 F. Supp. 2d at 413.

Congress intended the PSLRA to reform class action securities litigation. See H.R. Rep. No. 369, 104th Cong., 1st Sess. 32-33 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 730-31. Congress' most important objective was to end the perceived manipulation of securities litigation by lawyers:

> [The PSLRA] is intended to empower investors so that they, not their lawyers, control securities litigation. Under the current system, the initiative for filing 10b-5 suits comes almost entirely from the lawyers, not from genuine investors. . . . [I]nvestors in the class usually have great difficulty exercising any meaningful direction over the case brought on their behalf. The lawyers can decide when to sue and when to settle, based largely on their own financial interests, not the interests of their purported clients. . . . [The Act] contains several provisions to transfer primary control of private securities litigation from lawyers to investors.

S. Rep. No. 98, 104th Cong., 1st Sess. 6 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 685; see also H.R. Rep. No. 369, 1995 U.S.C.C.A.N. at 731.

The lead plaintiff provisions of the PSLRA were designed to reduce lawyer-driven litigation by encouraging the most capable representatives of the plaintiff class to participate in class action litigation and by giving command of the litigation to persons with substantial holdings who would be in a position to supervise and control the lawyers for the class. Congress believed institutional investors to be the most capable representatives because of their large holdings, which give them a substantial interest in the outcome of securities class actions, and their experience as fiduciaries and financial and legal sophistication, which enable them to manage complex litigation and to oversee and negotiate with experienced lawyers. See H.R.

Rep. No. 369, 1995 U.S.C.C.A.N. at 731. See also Gluck v. Cellstar, 976 F. Supp. at 548 ("The legislative history of the Reform Act is replete with statements of Congress' desire to put control of such litigation in the hands of large, institutional investors").

Accordingly, where a "group" has applied for lead plaintiff status, a court should examine whether the group's appointment will advance these objectives, allowing its decision to be informed by the factors set forth above. This Court adopted such an approach in Waste Management:

> Thus the concerns underlying the PSLRA for wresting control of the litigation away from the lawyers and making a plaintiff or a group of related plaintiffs the monitors and controllers of the litigation must restrict such an approach . . . . The Court does not believe that automatic arbitrary restrictions, such as a specific number of Lead Plaintiffs or a specific common connection should be required in all class actions under the PSLRA, but finds that the circumstances of each suit must be considered in determining appropriate restraints on random aggregation by counsel.

128 F. Supp. 2d at 431.[9] For instance, a group with so many members that meaningful communication about litigation strategy would be impossible is not in a position to manage the case or control their lawyers.[10] A group artificially created to amass the largest financial interest in the outcome of the litigation demonstrates that such a group is lawyer-driven, and not client-

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9/ See also Sakhrani v. Brightpoint, 78 F. Supp. 2d 845, 853 (S.D. Ind. 1999) (the PSLRA gives courts discretion to appoint a single plaintiff or a small group with effective oversight of class counsel and with a greater connection than their common losing investment and lead counsel, based on the facts of a particular case); In re Baan Co. Sec. Litig., 186 F.R.D. 214, 224 (D.D.C. 1999) ("a court generally should only approve a group that is small enough to be capable of effectively managing the litigation and the lawyers").

10/ See Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d 1146 (N.D. Cal. 1999) (group of 4,000 sought appointment as lead plaintiff).

controlled.[11] Yet, where appointment of a proposed group is consistent with and will advance the Act's objectives, the group should be appointed.

B. Appointment of the FSBA and the NYC Funds As A Group Will Advance the Objectives of the PSLRA

An examination of the various factors identified above supports appointment of the FSBA and the NYC Funds as co-lead plaintiffs and is consistent with the Act's objectives.

First, the group consists of only two members.[12] Courts have uniformly held that groups of this size are permissible. See Berger v. Compaq Computer Corp., 257 F.3d 475, 478 n.2 (5th Cir. 2001) ("it is notable that the Securities and Exchange Commission has taken the position that a group of investors appointed to serve as lead plaintiffs ordinarily should comprise no more than three to five persons"), reh'g denied en banc, No. 00-20875, 2002 U.S. App. LEXIS 579 (5th Cir. Jan. 14, 2002);[13] Waste Management, 128 F. Supp. 2d at 412-13 (holding that "at maximum a small group" would be considered for appointment) (citations omitted).

Second, as the FSBA singly has by far the largest loss, the group was not created merely

11/ See In re Donkenny Inc. Sec. Litig., 171 F.R.D. 156, 157-58 (S.D.N.Y. 1997) (denying appointment of group where lawyers had designated group of unrelated plaintiffs in order to aggregate financial stakes).

12/ In Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d at 1157, n.11, the court recognized that although the NYC Funds "are separate entities . . . they are essentially one person for purposes of the Reform Act, because they are all under the jurisdiction of [the] New York City Comptroller's Office, and are represented in their dealings with private counsel through one 'in-house' counsel, the Corporation Counsel of the City of New York." See also Waste Management, 128 F. Supp. 2d at 432, finding that Connecticut functions as a single investor as its pension funds are directed by a single individual, the Treasurer of the State of Connecticut.

13/ See Waste Management, 128 F. Supp. at 413 (quoting the SEC's amicus brief in the Orbital litigation: "'The Commission believes that ordinarily, in order to ensure adequate stakes, monitoring, coordination and accountability, such a group should be no more than three to five persons, and the fewer the better'").

to aggregate losses in order to manufacture the largest financial interest in the litigation and obtain the presumption of "most adequate plaintiff." Here, the FSBA alone has nearly $335 million in losses, which is more than double the losses of any other single applicant, and more than any other group of movants. The Funds' decision to work together to prosecute this litigation was motivated by their shared conviction that their collective experience and combined resources would be of greater benefit to the investor class. See Declaration of Leslie A. Conason in Support of Amended Motion of the Florida State Board of Administration and the New York City Pension Funds for Appointment of Co-Lead Plaintiffs and Co-Lead Counsel ("Conason 1/14/02 Decl."); Affidavit of Linda Lettera ("Lettera 1/11/02 Aff."); Supplemental Declaration of Leslie A. Conason ("Conason 1/26/02 Decl.") (Exhibit C). Collectively, the Funds have the experience necessary and resources available to manage litigation of this magnitude.[14] Moreover, in making their determination to work together, the FSBA and the NYC Funds were cognizant of Judge Rosenthal's Order of January 8, 2002, in which the Court adopted a briefing schedule "[i]n order to give potential lead plaintiffs adequate time to engage in discussions aimed at narrowing their differences or reaching a stipulation regarding lead plaintiff motions . . ."

Third, the NYC Funds and the FSBA are not individual investors, but are public institutions whose participation in securities litigation Congress sought to encourage. As the SEC has noted, "institutions have skills and expertise that are likely to be very valuable to investors, and, because institutions frequently have a substantial financial interest at stake, are likely to devote substantial time and resources to representing investors in litigation." See

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14/ For instance, in Cendant, which resulted in the largest settlement to date in the history of securities litigation, three separate and unrelated institutions worked together as co-lead plaintiffs. In re Cendant Corp. Litig., 182 F.R.D. 144 (D.N.J. 1998). The Enron disaster may well dwarf Cendant. With so much at stake in this case, it is not unreasonable for institutions to combine to maximize their effectiveness as lead plaintiffs.

Memorandum of the Securities and Exchange Commission, Amicus Curiae, filed in Switzenbaum v. Orbital Sciences Corp., Case No. 99-197-A (E.D. Va.), at 10. More importantly, the Funds have demonstrated for the Court that they are, and intend to remain, active clients in this litigation. See Declaration of Leslie A. Conason in Support of the Motion of the New York City Pension Funds for Appointment as Lead Plaintiff and Approval of its Selection of Counsel ("Conason 12/20/01 Decl."); Conason 1/14/02 Decl.; Lettera 1/14/02 Aff.; Conason 1/26/02 Decl., at ¶¶ 5-6. The Funds have retained competent counsel and have negotiated competitive fees with their counsel.[15] See id. In addition to retaining capable counsel for a reasonable fee, they will actively manage this litigation by reviewing and approving written submissions to the Court and by regularly consulting with counsel and each other about all strategic decisions, including decisions regarding whom to sue, and how and when to resolve the litigation. Conason 1/14/02 Decl., at ¶¶ 8-12; Conason 1/26/02 Decl., at ¶¶ 5-6. Their retainer agreement with counsel memorializes the active role they will play. Id. The Funds have a track record of achieving both monetary and corporate governance benefits for the classes they represent and of reducing attorneys' fees in cases in which the Funds are involved.[16]

15/ The Regents have questioned the need for the number of law firms that the FSBA and the NYC Funds seek to have appointed as co-lead counsel. The FSBA and the NYC Funds have concluded that the unprecedented magnitude of this case requires staffing beyond that of typical litigation. Conason 1/26/02 Decl., at ¶¶ 2-6. Moreover, the terms of the retainer agreement entered into between the Funds and their counsel assures frequent client monitoring of counsel's conduct of the litigation, as well as client review of monthly time and expense reports. Id. at ¶ 5.

16/ For NYC Funds: see, e.g., In re Cendant Corp. Litig., 264 F.3d 201, 218 (3d Cir. 2001) (NYC Funds, along with two other institutional investors, obtained settlement of $3.2 billion and corporate governance changes including annual election of all directors, prior shareholder approval of employee stock option re-pricing, and independent audit, nominating and compensation committees for Board; NYC Funds, having negotiated a historically low fee with counsel, alone pursued a successful appeal to vacate the district court's approval of attorneys' fees based on an auction and resulting in fees $75 million higher than the negotiated

Fourth, the NYC Funds and the FSBA have a pre-litigation relationship. See Taylor 1/28/02 Decl., at ¶ 2. They have worked closely for years on corporate governance issues. Both are active members of the Council for Institutional Investors.[17] The executive director of the FSBA, Tom Herndon, has chaired the Council's Executive Committee. Both the FSBA and the NYC Funds are members of the Council's Policy Committee, the aim of which is to improve corporate governance and disclosure issues for the benefit of investors. Id. In addition, the NYC Funds and the FSBA are both active members of the National Association of Public Pension Attorneys, an organization which deals with corporate governance and fiduciary issues. Id.[18]

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retainer fee). For the FSBA: see, e.g., In re UCAR Int'l, Inc. Sec. Litig., Case No. 98-CV-0600 (D. Conn.) (corporate governance relief obtained by FSBA included addition of new outside director to Board and fee renegotiated down to a lower percentage because of early settlement); In re Samsonite Corp. Sec. Litig., Case No. 98-K-1878 (D. Colo.) (FSBA obtained a $24 million settlement or 51% of available damages and corporate governance requiring Samsonite to adopt new rules regarding conflict of interest safeguards, insider stock sales and more independent directors).

17/ The Council for Institutional Investors was founded in 1985 to provide a voice for institutional shareholder interests. Its membership consists of over 100 public and private pension funds that collectively own more than $1 trillion in financial assets. The Council provides a forum for funds to share information and to jointly monitor corporate performance, executive pay and governance related issues. In addition, it also provides a vehicle through which its members may bring about change in these areas, either by direct communication with the corporation or by legislative action. Taylor 1/28/02 Decl., at ¶ 2.

18 The relationship on which the State Group so heavily relies is not one between the state pension funds which comprise that group. Rather, it is a relationship among counsel for those funds – the attorneys general of Georgia, Ohio, and Washington. Moreover, those relationships do not involve the type of issues with which the lead plaintiff will be confronted in this case. In contrast, the FSBA and the NYC Funds themselves have a pre-existing relationship involving various corporate governance-related organizations and committees. See Taylor 1/28/02 Decl., Lettera 1/25/02 Aff. The FSBA and the NYC Funds "share the same fundamental core policies regarding shareholder rights and board accountability." Taylor 1/28/02 Decl., at ¶ 2. These shared corporate governance activities and policies, coupled with the extensive experience of the FSBA and the NYC Funds, evidences a cohesiveness and relationship in connection with the very issues at the heart of this litigation which will be of enormous benefit to the class.

III. THE FSBA IS NOT BARRED FROM SERVING AS CO-LEAD PLAINTIFF

The PSLRA's "Restriction on Professional Plaintiffs" provision (the "Provision") does not apply to institutional investors such as the FSBA and the NYC Funds.[19] Applying the Provision to prevent the FSBA from serving as co-lead plaintiff in this litigation would be contrary to the purpose of the PSLRA, as interpreted by the Fifth Circuit and this Court. See 15 U.S.C. § 78u-4(a)(3)(B)(iii); Berger v. Compaq, 2002 U.S. App. LEXIS 579, at *1-2; Waste Management, 128 F. Supp. 2d at 431.

The language of the Provision expressly gives courts the authority to waive the five case in three year limitation in appropriate circumstances. 15 U.S.C. § 78u-4(a)(3)(B)(vi). See H.R. Conf. Rep. 104-369 (1995), reprinted in 1995 U.S.C.C.A.N. 730. The PSLRA's legislative history instructs that:

- institutional investors like the FSBA and the NYC Funds "do not represent the type of professional plaintiff that the [PSLRA] seeks to restrict";
- courts have the "discretion to avoid the unintended consequence of disqualifying institutional investors from serving more than five times in three years"; and
- applying the Provision should not "operate at cross purposes with the 'most adequate plaintiff provision'" of the PSLRA.

H.R. Conf. Rep. 104-369, at 35 (1995) reprinted in 1995 U.S.C.C.A.N.679, 734.[20] This is an

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19/ The NYC Funds have not sought to serve as a lead plaintiff more than five times in the last three years, so the Provision – by its terms – is inapplicable to the NYC Funds. Indeed, the NYC Funds are not involved in any ongoing securities class actions (with the exception of the resolution of the fee issue in Cendant).

20/ The Conference Report for the PSLRA is "the most reliable evidence of congressional intent." In re Silicon Graphics, Inc. Sec. Litig., 183 F.3d 970, 977 (9th Cir. 1999); In re Network Associates, Inc. Sec. Litig., 76 F. Supp. 2d 1017, 1030 (N.D. Cal. 1999) (citing Silicon Graphics). See also In re Timbers of Inwood Forest Associates, Ltd., 793 F.2d 1380, 1399 n.33 (5th Cir. 1986) ("The report of a conference committee . . . next to the statute itself . . . is the most persuasive evidence of Congressional intent").

appropriate case for the Court to use its discretion.

Based upon the foregoing legislative history, numerous courts have determined that the Provision does not apply to institutional investors, and have appointed the FSBA to serve as lead plaintiff in spite of the Provision. See Naiditch v. Applied Micro Circuits Corp., No. 01-CV-0649-K (AJB), 2001 U.S. Dist. LEXIS 21374, at *8 (S.D. Cal. Nov. 5, 2001) (FSBA's "11 appointments as lead plaintiff is quite understandable, and in fact could evince a laudatory zeal to fulfill its fiduciary duties. Such experience will well equip FSBA to oversee this litigation. The court therefore appoints FSBA as lead plaintiff"); Myers v Schering-Plough Corp. et al., Case No. 01-CV-829 (D.N.J.) Order Appointing Lead Plaintiff, dated July 3, 2001 (language of the PSLRA and its legislative history "make clear that the 'restrictions on professional plaintiffs provision' are not intended to apply to institutional investors, such as the FSBA") (emphasis added) (Exhibit D); In re Critical Path, Inc. Sec. Litig., 156 F. Supp. 2d 1102, 1112 (N.D. Cal. 2001) ("Congress did not intend to apply this prohibition to institutional investors"); Piven v. Sykes Enterprises, Inc., 137 F. Supp. 2d 1295, 1304 (M.D. Fla. 2000) (Aug. 25, 2000 Report and Recommendation and Sept. 14, 2000, Order Adopting such Report, reported at 2000 U.S. Dist. LEXIS 20983 and 2000 U.S. Dist. LEXIS 20986, respectively) ("institutional Plaintiffs with 'real' interests at stake are preferred plaintiffs in this context"). In each of the foregoing recent decisions, the court exercised its statutory discretion to hold that the Provision does not apply to institutional investors generally, and to the FSBA specifically.

Disqualifying the FSBA from this litigation would actually defeat a primary objective of the PSLRA. One of the PSLRA's main goals is for "the Court [to] appoint as 'lead plaintiff' in each securities class action the shareholder, preferably an institutional investor, with the largest financial interest in the litigation in order to encourage institutional investors to come forward to manage the litigation and supervise the class action lawyers." Waste Management, 128 F. Supp. 2d at 411 (citing 15 U.S.C. § 78u-4(a)(3)(b)) (emphasis added). By restricting the FSBA from seeking appointment as a co-lead plaintiff here because of the Provision, the Court would be barring the very type of investor Congress desired to serve as lead plaintiff – institutional investors with the largest financial interest in the litigation (dwarfing all other applicants), who will actively manage the litigation and supervise the lawyers. Applying the Provision to prohibit a large pension fund that has suffered a loss of more than $335 million would be entirely inconsistent with the purposes of the PSLRA. See Waste Management, 128 F. Supp. 2d at 411-12 (noting that "one goal of the PSLRA is to have the plaintiff class, represented by a member with a substantial financial interest in the recovery as incentive, monitor the litigation to prevent its being 'lawyer driven'").

A. The Regents Mischaracterize the PSLRA's Legislative History and the Relevant Case Law

The Regents' flawed argument that the Provision bars the FSBA from serving as a co-lead plaintiff in this litigation is premised upon mischaracterizations of both the PSLRA's legislative history and relevant case law. For example, the Regents contend that the Conference Report (H.R. Conf. Rep. 104-369) "makes it clear" that this Court may use its discretion to waive the Provision "only if the [FSBA] can establish the need to exceed the limitation." Regents Mem. at 17-18 (emphasis in Regents Mem.).[21] There is simply no authority for the contention that an institutional plaintiff bears the burden of establishing a "need" to exceed the Provision's

21/ The Regents' strained interpretation is based upon the following Congressional directive: "Institutional investors seeking to serve as lead plaintiff may need to exceed this limitation and do not represent the type of professional plaintiff the legislation seeks to restrict." H.R. Conf. Rep. 104-369, at 35 (1995), reprinted in 1995 U.S.C.C.A.N.679, 734.

limitation.[22] Instead, the Conference Report language upon which the Regents rely negates the very inference that the Regents urge this Court to adopt. If institutional investors "do not represent the type of professional plaintiff that the legislation seeks to restrict," then it would defeat the purposes of the PSLRA to require an institutional investor to affirmatively prove a "need" to avoid application of the Provision. See H.R. Conf. Rep. 104-369, at 35 (1995) reprinted in 1995 U.S.C.C.A.N. 679, 734.

The plain language of the Conference Report specifically states that applying the Provision to disqualify an institutional investor would be an "unintended consequence" that a court should exercise "discretion to avoid." Id. As the Conference Report further directs, the Provision should not be applied to "operate at cross purposes with the 'most adequate plaintiff' provision." Id.

Recognizing that every court opining on the issue recently has declined to apply the Provision to bar institutional investors from serving as lead plaintiffs, the Regents rely on a decision in Telxon. See Regents Mem. at 16 (discussing In re Telxon Corp. Sec. Litig., 67 F. Supp. 2d 803 (N.D. Ohio 1999)). Telxon's analysis of the PSLRA ignores the Act's legislative history entirely, and is contrary to Congress' intent as expressed in the Conference Report. The majority of courts to consider this issue since Telxon have declined to follow Telxon. See, e.g.,

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22/ Even assuming, which the FSBA does not, that an institutional investor is required to demonstrate a "need" to avoid the Provision, the FSBA satisfies such a burden. The FSBA lost approximately $335 million ($190 million more than the Regents) from its Class Period purchases of Enron securities, the largest loss of any single or group movant in this litigation. The FSBA serves as a fiduciary, overseeing the investment of more than $100 billion in retirement benefits for employees of the State of Florida. As a retirement system fiduciary with the largest financial stake in the outcome of this litigation, the FSBA "needs" to serve as a co-lead plaintiff in this litigation to fulfill the PSLRA's and this Circuit's direction that "courts appoint, as Lead Plaintiff, the most sophisticated available and willing investor" that is "capable of understanding and controlling the litigation." Berger v. Compaq, 2002 U.S. App. LEXIS 579, at *1.

Naiditch v. Applied Micro Circuits Corp., 2001 U.S. Dist. LEXIS 21374, at *7-8; Myers v Schering-Plough Corp. et al., Case No. 01-CV-829 (D.N.J.) Order Appointing Lead Plaintiff, dated July 3, 2001 (Exhibit D); In re Critical Path, Inc. Sec. Litig., 156 F. Supp. 2d at 1112; Piven v. Sykes Enterprises, Inc., 137 F. Supp. 2d at 1304 1305 ("The undersigned disagrees with the reasoning in Telxon . . ."). But see McKesson, 79 F. Supp. 2d 1146.[23] Even in Telxon, however, the court recognized that an institutional investor may be selected as lead plaintiff when the loss of a competing movant is "dwarfed by that institutional investor." Telxon, 67 F. Supp. 2d at 822.[24]

The Regents also misread the court's decision in Ezra Charitable Trust v. Rent-Way, Inc., 136 F. Supp. 2d 435 (W.D. Pa. 2001). The Regents contend that "Judge McLaughlin rejected the FSBA's bid for lead plaintiff as a result of its litigiousness." Regents Mem. at 16. In Rent-Way, however, the court never suggested that the FSBA's "litigiousness" was a basis for the court's decision. Rather, the court stated that "Cramer [a competing movant] has the largest financial interest in the relief sought by the purported class in this case." Rent-Way, 136 F. Supp. 2d at 443. Consistent with the PSLRA, the Rent-Way court determined that the movant with the largest interest in the litigation [Cramer, with a loss of $10.1 million, vs. the FSBA, with a loss of $6 million] also satisfied the pertinent requirements of Rule 23, and appointed that applicant to serve as lead plaintiff. Rent-Way, 136 F. Supp. 2d at 444-45. Applying the same procedure

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23/ The Regents' and the State Group's reliance on the court's discussion of this issue in McKesson (see Regents Mem. at 16; State Group Mem. at 12 (discussing application of Provision to prevent the FSBA from serving as lead plaintiff)) is similarly misplaced, as that decision was handed down shortly after Telxon, but before the string of recent authorities concluding that the legislative history of the statute compels a different result, at least in appropriate circumstances, such as here.

24/ Here, the FSBA's losses of $335 million dwarf the Regents' $144 million loss, which represents a mere 43% of the FSBA's losses, and a mere 32.5% of the Funds' total losses.

here will result in the appointment of the FSBA and the NYC Funds as co-lead plaintiffs.

B. The FSBA and the NYC Funds Have The Proven Resources and Experience To Serve As Co-Lead Plaintiffs

The Regents and the State Group claim that the FSBA's involvement in "numerous" allegedly pending securities class actions will prevent the Funds from effectively monitoring and participating in this litigation. Regents Mem. at 20-23; State Group Mem. at 12-13. As detailed in the sworn statements of their respective General Counsel, the Funds' are prepared to dedicate their combined resources to obtain the best recovery for the Class.[25]

1. The FSBA's Litigation Resources Are Not Overextended

The Regents erroneously contend that the FSBA is actively involved in "24 other securities actions, including 18 other securities class actions (nine of which require it to serve as lead plaintiff) and six individual securities cases." Regents Mem. at 20. Similarly, the State Group states that the FSBA "has moved to be a lead plaintiff in thirteen securities fraud class actions in just the last five years." State Group Mem. at 12. However, a number of the actions that the Regents reference in their brief are settled or otherwise concluded.[26] In fact, the FSBA

25/ See Lettera 12/19/01 Aff. and Conason 12/20/01 Decl. See also Conason 1/26/02 Decl. and Lettera 1/25/02 Aff.

26/ Florida State Board of Administration v. Cendant, Case No. 98cv4385 (D.N.J); In re Critical Path Sec. Litig., Case No. C-01-0551-WHO (N.D. Cal.); In re Dollar General Corp. Sec. Litig., Case No. 3:01-0388 (M.D. Tenn); Fanni v. Northrop Grumman Corp., Case No. CV-98-06197-DT (C.D. Cal) (dismissed on appeal, Case No. 00-55817, 9th Cir., Dec. 10, 2001); Ezra Charitable Remainder Trust v. Rent-Way, Inc., Case No. 00-cv323 (W.D. Pa.) (FSBA not lead plaintiff); State Board of Administration v. Rite Aid Corp., Case No. 00-CV-5367 (E.D. Pa.); Florida State Board of Administration v. Brick, Case No, 99-CV-561 (N.D. Ohio) (dismissed on appeal); Laperriere v. Vesta Insurance Group, Inc., Case No. 98-CV-01401 (N.D. Ala.); and Florida State Board of Administration v. Waste Management, Inc., Case No. 01-CV-00984.

serves as a lead plaintiff under the PSLRA in only four currently active cases.[27] Serving as a lead plaintiff in this action will not overextend the FSBA's resources.[28] See Lettera 1/25/02 Aff. ¶ 5.

The FSBA's sophisticated and experienced litigation resources are far less extended than the other movants contend. Indeed, in a case of this magnitude, experience managing class actions will confer a distinct benefit on the class, and a lead plaintiff (such as the Regents or the State Group) who has never directed a securities fraud class action will be at a significant disadvantage. The FSBA and the NYC funds are the appropriate plaintiffs to lead this litigation. Berger v. Compaq, 2002 U.S. App. LEXIS 579, at *1-2.

2. The FSBA and the NYC Funds Have the Proven Resources to Assure that the FSBA and the NYC Funds Manage, Direct, and Control This Litigation Together

As demonstrated above, the FSBA has ample resources to serve as co-lead plaintiff in this litigation. The Regents and the State Group completely overlook the experience and

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27/ The four actions are Naiditch v. Applied Micro Circuits Corp., Case No. 01-CV-0649-K (S.D. Cal.); In re DaimlerChrysler AG, Case No. 00-CV-003 (D. Del.); Myers v. Schering-Plough Corp., Case No. 01-CV-00829 (D.N.J.); and Piven v. Sykes Enterprises, Case No. 00-CV-212 (M.D. Fla.). (See Lettera 1/25/02 Aff. ¶ 5.)

28/ In July 2001, the FSBA was appointed to serve as co-lead plaintiff with the Teachers' Retirement System of Louisiana in In re Dollar General Corp. Sec. Litig., Case No. 3:01-0388 (M.D. Tenn.). See Exhibit E. Among the firms appointed to serve as co-lead counsel in Dollar General with the FSBA's chosen counsel were the Regents' counsel, Milberg Weiss Hynes Bershad & Lerach ("Milberg Weiss"), and the State Group's counsel, Grant & Eisenhofer, two firms that now contend that the FSBA's "litigiousness" prevents it from serving as co-lead plaintiff in this case. By the logic of its own argument, Milberg Weiss should be disqualified from appointment as lead counsel, because it is currently acting as lead counsel in at least half of all currently active securities litigations. See "Seeking Top Berth In Pursuit of Enron," The New York Times, Jan. 22, 2002, at C-6 (Exhibit F). The Grant & Eisenhofer firm appears as Proposed Lead Counsel on the signature page (p. 24) of the State Group's Memorandum In Opposition to Competing Motions for Appointment as Lead Plaintiff, but is conspicuously absent as Proposed Lead Counsel from the signature page (p. 16) of the State Group's Opposition to the Funds' Motion.

sophistication that the NYC Funds possess and will dedicate to prosecute this action on behalf of the class. The FSBA's and NYC Funds' combined experience and resources confer a benefit upon class members that no other movant can match.

In her Declarations, Leslie A. Conason testifies to the NYC Funds' broad and demonstrable experience in litigating securities class actions.[29] As Ms. Conason testifies, the NYC Funds have achieved significant monetary and corporate governance relief on behalf of shareholders in several notable securities class actions. The NYC Funds draw upon the strength of the New York City Law Department's legal staff of more than 650 attorneys, who possess experience in all areas of litigation. The results that the NYC Funds obtained as a lead plaintiff in the massive Cendant shareholder litigation are an irrefutable example of the NYC Funds' ability and willingness to manage, direct, and control complex litigation. See Berger v. Compaq, 257 F.3d at 481-84. Among other results achieved, the NYC Funds' dedication to the class members' interests motivated the NYC Funds to challenge the $262 million fee requested by class counsel as being in violation of counsel's retainer agreement. As a result of the NYC Funds' challenge to the attorneys' fees sought in Cendant, the class' recovery will increase by at least $75 million.[30]

The NYC Funds and the FSBA have already combined their sophistication and expertise to secure benefits for the members of the class in this litigation. In this regard, the Funds have negotiated a fee agreement with proposed co-lead counsel that the Funds believe will

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29/ See Conason 1/14/02 Decl., at ¶¶ 2-4, 11-12. See also Conason 12/20/01 Decl., at ¶¶ 2-10.

30/ As a result of the NYC Funds' efforts, the Third Circuit vacated the fee award as improper and instructed the District Court to refuse to consider further fee requests that have not received the NYC Funds' (and the other co-lead plaintiffs') prior approval. See In re Cendant Corp. Litig., 264 F.3d at 286.

significantly enhance the class' recovery.[31] Moreover, the retainer agreement contains provisions specifically designed not only to enable the Funds to actively monitor and manage this litigation, but also to safeguard against increased costs and duplication of attorney efforts.[32] The Funds' combined resources, which have already produced a retainer and fee agreement that will maximize the recovery for the class, confirm that the Funds are best equipped to "monitor the litigation to prevent its being 'lawyer-driven.'" Waste Management, 128 F. Supp. 2d at 411-12.

IV. THE STATE GROUP AND THE REGENTS HAVE FAILED TO OFFER ANY PROOF REQUIRED UNDER THE PSLRA TO REBUT THE PRESUMPTION OF THE FUNDS' ADEQUACY TO REPRESENT THE INTERESTS OF THE CLASS

A. Standards for Rebutting the FSBA and the NYC Funds' Presumption of Adequacy

The PSLRA sets forth a rebuttable presumption that the "most adequate plaintiff" is the movant that "has either filed the complaint or made a [lead plaintiff] motion," "has the largest financial interest in the relief sought by the class," and "otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. at § 78u-4(a)(3)(B)(iii)(I). This presumption may be rebutted "only upon proof by a member of the proposed class that the presumptively most adequate plaintiff will not fairly and adequately protect the interests of the class or is subject to unique defenses that render such plaintiff incapable of adequately representing the class." 15 U.S.C. at § 78u-4(a)(3)(B)(iii)(II). (Emphasis added.)

As set forth in their prior submissions, the FSBA and the NYC Funds have far and away

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31/ As noted above, the Funds will submit their retainer and fee agreement to the Court under seal for its in camera review, if the Court so requests.

32/ See Conason 1/14/02 Decl., at ¶ 12.

the largest financial interest in the relief sought in this litigation. As to typicality and adequacy, the Rule 23 inquiry "at the Lead Plaintiff stage is not as searching as the one triggered by a subsequent motion for class certification." Waste Management, 128 F. Supp. 2d at 411 (citing Switzenbaum v. Orbital Sciences Corp., 187 F.R.D. 246, 250 (E.D. Va. 1999) and other authorities). See also Holley v. Kitty Hawk, Inc., 200 F.R.D. 275, 281 (N.D. Tex. 2001); Gluck v. Cellstar Corp., 976 F. Supp. at 546. The FSBA and the NYC Funds have made a prima facie showing that they are typical representatives of the class, since their claims arise out of the same conduct and are based upon the same legal theories as those of all other class members. Lightbourn v. County of El Paso, 118 F.3d 421, 426 (5th Cir. 1997); Waste Management, 128 F. Supp. at 411. The Funds' adequacy is established by their filings showing that the FSBA and the NYC Funds are "active, able class representatives who are informed and can demonstrate they are directing the litigation." See Point II A, supra; Berger v. Compaq, 257 F.3d at 483.

Contrary to the State Group's contention (State Group Mem. at 11), the "mere presence" of an "arguable" unique defense does not render the FSBA atypical. Rather, the "unique defense" argument only arises when proof exists that a class representative is subject to defenses peculiar only to him which would seriously distract the trier of fact from the common issues and jeopardize the prosecution on behalf of absent class members. Warren v. Reserve Fund, Inc., 728 F.2d 741, 747 (5th Cir. 1984); In re Arakis Energy Corp. Sec. Lit., No. 95-CV-3431, 1999 U.S. Dist. LEXIS 22246, at *42 (E.D.N.Y. Apr. 30, 1999.)[33]

The Regents' and the State Group's attempts to raise the presence of "unique defenses"

33/ The Regents dispense with case law altogether, asserting that the mere "threat" of unique defenses renders the FSBA unable to make an initial showing that it satisfies the requirements of Rule 23. Regents Mem. at 23. As set forth above, the FSBA has made the required prima facie showing of compliance with Rule 23. The burden is now on the Regents to rebut the presumption of adequacy with proof.

against the FSBA are based upon speculation and conjecture regarding the FSBA's arrangement with investment manager Alliance Capital Management L.P. ("Alliance Capital"), and the timing of some of FSBA's later purchases of Enron shares. This speculation and conjecture fall well short of the "proof" required to rebut the presumption in favor of the FSBA and the NYC Funds. See Armour v. Network Associates, Inc., 171 F. Supp. 2d 1044, 1054 (N.D. Cal. 2001). ("These arguments fail for several reasons. Most importantly, they are based on pure speculation. The PSLRA requires 'proof' that the presumptively most adequate plaintiff will not fairly and adequately protect the class or is subject to unique defenses"); In re E.spire Communications, Inc. Sec. Lit., H-00-1140, 2000 U.S. Dist. LEXIS 19517, at *22-23 (D. Md. Aug. 15, 2000) ("The arguments presented by the Matassa Group . . . are conjectural. . . . Neither the Matassa Group nor the Tawfik Movants have offered evidence rebutting Thomas Gleason's ability to represent the class fairly and adequately").[34]

B. The FSBA's Relationship With Its Investment Manager, Alliance Capital, Does Not Subject The FSBA to a Unique Non-Reliance Defense

The ultimate conclusion to which both the State Group and the Regents jump is that the FSBA somehow acquired millions of shares of Enron common stock with knowledge of the fraud and therefore did not rely on Enron's misstatements when it paid artificially inflated prices for Enron stock. The Regents even suggest that Alliance Capital "knew about the Enron fraud at

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[34] See also In re Cell Pathways, Inc. Sec. Litig., 203 F.R.D. 189, 192 (E.D. Pa. 2001) (no proof to rebut the presumption); Carson v. Clarent Corp., No. C 01-03361, 2001 U.S. Dist. LEXIS 22059 at *8 (N.D. Cal. December 14, 2001) (no proof); Netsky v. Capstead Mortgage Corp., No. 3:98-CV-1716-L, 2000 U.S. Dist. LEXIS 9941 at *32 (N.D. Tex. July 12, 2000) (no proof); Charles Dechter Family Trust v. Anicom, Inc., No. 00CV4391, 2000 U.S. Dist. LEXIS 14949 at *5-6 (N.D. Ill. Oct. 3, 2000) ("no proof to rebut the presumption in favor of SWIB as lead plaintiff").

the time of purchase." (Regents Mem. at 27-29.) The State Group speculates that the FSBA may have somehow "relied on non-public information to purchase Enron stock" (State Group Mem. at 8). In addition to being counterintuitive and illogical, these arguments are predicated on pure speculation, which does not constitute the proof needed to rebut the PSLRA's presumption favoring the appointment of the Funds as co-lead plaintiffs.

The fact that Alliance Capital had an investment management agreement with the FSBA does not subject the FSBA to "unique defenses." The complete absence of any evidence that Alliance Capital's purchases of Enron securities in the FSBA's account were made with "knowledge of the fraud," or any other inside information is fatal to the State Group's and the Regents' attempt to rebut the "most adequate plaintiff" presumption.

The facts regarding Alliance Capital are as follows: the individual responsible for overseeing this relationship for the FSBA was Ken Menke, the FSBA's Assistant Chief of Domestic Equity. The FSBA operated under an investment management agreement with Alliance Capital. The person responsible for the investment and management of the FSBA's funds at Alliance Capital at all times was Alfred Harrison. See Menke Affidavit, ¶ 3 (Exhibit G). Mr. Menke never dealt with nor even heard of Frank Savage in connection with the investment relationship between the FSBA and Alliance Capital at any time during the class period in this case. According to public records, Frank Savage, who was on the Board of Directors at Enron, did not hold any position with Alliance Capital. Rather, Mr. Savage was, until he resigned on August 1, 2001, Chairman of Alliance Capital Management International, a separate division of Alliance Capital. See Bloomberg News Release dated July 17, 2001 (Exhibit H). Mr. Savage was one of 23 directors of Alliance Capital Management Corporation ("ACMC"). See Alliance Capital Form 10-K, pp. 87-91 (Exhibit I). ACMC was the general partner of Alliance Capital, and held a 1% general partnership interest in Alliance Capital. See Alliance Capital Form 10-K, p. 65. On August 1, 2001, Mr. Savage left Alliance Capital Management International in order to start his own private equity firm. At no time, prior to his resignation on August 1, 2001, did Mr. Savage have any involvement with the FSBA's account. See Menke Affidavit ¶ 3. According to statements made by Mr. Harrison to Ken Menke at the FSBA, Mr. Harrison never discussed Enron with Mr. Savage. See Menke Affidavit ¶ 4. Even if one were to assume that Alliance Capital had some theoretical access to Enron's true financial condition by reason of Mr. Savage, he resigned his position as Chairman of Alliance Capital Management International on August 1, 2001, months before the October and November purchases which both the Regents and the State Group characterize as suspicious.[35] Those are the facts regarding Alliance Capital. No unique defenses arise out of these facts, and this Court should reject the State Group's and the Regents' speculation and conjecture regarding what "could" or "might" be true.

Not only do the facts refute the notion of some knowledge of the fraud, but the State Group and the Regents can point to no evidence to support the proposition that Alliance Capital would purchase Enron shares for one of its largest institutional clients with knowledge of Enron's precarious financial condition.[36]

The State Group and the Regents also make much of the fact that the FSBA's officers have stated that they are looking into Alliance Capital's handling of the FSBA's account to

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35/ The State Group points out that suits were first filed against Enron on October 22, 2001; however, the operative class period was later extended through November 27, 2001, as more details of the fraud were disseminated into the market. The State Group and the Regents have adopted this later class period.

36 See Kalnit v. Eichler, 264 F.3d 131, 140-41 (2d Cir. 2001) (rejecting "view of the facts [that] defies economic reason"); Coates v. Heartland Wireless Communications, Inc., 55 F. Supp. 2d 628, 643 (N.D. Tex. 1999) (rejecting allegation that "defies common sense [and] is facially implausible").

determine whether there was "anything improper" on the part of Alliance Capital. The FSBA is a fiduciary and owes a duty to its beneficiaries to investigate any conduct that may have caused losses in its portfolio. Nothing less should be expected of a true fiduciary committed to representing the interests of its ultimate beneficiaries. The FSBA, however, has made it clear that no decisions have been made to take any action as to Alliance Capital other than the termination of its investment management agreement with Alliance Capital. See Lettera 1/25/02 Aff. ¶ 6.

The State Group points to two unrelated lawsuits filed by individual investors against Alliance Capital in connection with a mutual fund known as the Alliance Premier Growth Fund. These lawsuits are irrelevant because (1) the FSBA is not a party to these lawsuits; (2) the FSBA had no investments in the Alliance Premier Growth Fund, and (3) there is no relationship between the plaintiffs in that litigation and the FSBA. The fact that certain individual investors have chosen to sue over the handling of a mutual fund by Alliance Capital is irrelevant to the FSBA's position in this litigation. But even assuming arguendo that FSBA had similar claims against Alliance Capital, the fact that a plaintiff may have an additional claim against its broker does not defeat reliance in the context of a fraud on the market case. See Ross v. Bank South, N.A., 837 F. 2d 980, 997-98 (11th Cir.), vacated on other grounds, 848 F.2d 1132 (1988).[37]

Lacking any evidence to rebut the FSBA's and NYC Funds' presumption of adequacy, the Regents and the State Group argue that Savage's purported knowledge of the wrongdoing at Enron can be "presumed" as a matter of law. Through Savage, Alliance Capital supposedly had

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[37] Allegations from unrelated lawsuits (see Regents Mem. at 29) or the December 11, 2001 correspondence from Alfred Harrison of Alliance Capital to Ken Menke of the FSBA (Exhibit 2 to the State Group Mem.), which, as discussed below, do not indicate that any transmittal of "inside" or different information was made to Alliance Capital, and do not constitute evidence to rebut the presumption.

actual or constructive knowledge of the massive problems with Enron. State Group Mem. at 6. As a result, Florida will allegedly be unable to establish that it was deceived because Alliance Capital allegedly could not have been deceived by the Enron fraud. Id. The law simply does not support these conclusions.

Rather than standing for the proposition that "courts routinely impute to directors and officers knowledge about adverse developments affecting their company's core of businesses," and notwithstanding misleading parentheticals, virtually every case cited in footnote 11 of the State Group's brief concerns the inference of guilty knowledge to "the company and its key officers." Epstein v. Itron, Inc., 993 F. Supp. 1314, 1326 (E.D. Wash. 1998) (emphasis added).[38] These cases are inapposite because Mr. Savage was neither an officer nor an inside director of Enron. Moreover, it is black-letter law that if Mr. Savage were acting to benefit Alliance Capital and/or Enron at the expense of the FSBA, his knowledge as agent would not be imputed to FSBA as principal. See, e.g., Kaplan v. Utilicorp United, Inc., 9 F.3d 405, 407 (5th Cir. 1993) ("[T]he knowledge and actions of employees acting adversely to the corporate employer cannot be imputed to the corporation"); United States v. One Parcel of Land, 965 F.2d 311, 316 (7th Cir. 1992) ("[W]here an agent obtains knowledge while acting outside the scope of his agency [e.g., to the detriment of the principal], the standard presumption is unfounded, and the court will not impute the agent's knowledge to the corporation"). In any event, while Mr. Savage's knowledge

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38 See also In re World Access, Inc. Sec. Litig., 119 F. Supp. 2d 1348, 1355-56 (N.D. Ga. 2000) (scienter allegations concerning the President, CEO and COO of the defendant company); In re Unisys Corp. Sec. Litig., Civ. Action No. 99-5333, 2000 U.S. Dist. LEXIS 13500, at *20 (E.D. Pa. Sept. 21, 2000) (inference of scienter as to President/CEO, Vice President and Executive Vice President); In re PeopleSoft, Inc. Sec. Litig., No. C99-00472, 2000 U.S. Dist. LEXIS 10953, at *12 (N.D. Cal. May 25, 2000) (Inference of scienter as to CEO and Senior Vice President of Finance); In re AETNA , Inc. Sec. Litig., 34 F. Supp. 2d 935, 953 (E.D. Pa. 1999) (inference of scienter as to CEO and Chief Financial Officer).

of the falsity of Enron's public statements may be a factual issue in this litigation, at this stage of this litigation such knowledge can neither be "presumed" nor "imputed" as a matter of law.

The State Group's reliance upon outdated "arguably unique defense" case law is similarly misplaced. The State Group cites to Wagner v. Lehman Brothers Kuhn Loeb, Inc., 646 F. Supp. 643 (N.D. Ill. 1986), for the proposition that when a unique defense is "arguably present," class certification may be denied. State Group Mem. at 11. The facts of that case hardly support such a characterization. In Wagner, the court not only found two violations of the disciplinary rules by the attorney prosecuting the case, but also found that the class representatives had participated to a substantial degree in these violations. Not surprisingly, the court not only found the class plaintiff subject to unique defenses, but also disqualified his lawyer from further proceedings in the case. See also Landry v. PriceWaterhouse Chartered Accountants, 123 F.R.D. 474, 476 (S.D.N.Y. 1989) (evidence from the testimony of three of the named plaintiffs that they had access to inside information from the directors of the defendant corporation); Grace v. Perception Technology Corp., 128 F.R.D. 165, 169 (D. Mass. 1989) (only plaintiff who had met privately with the corporation's chief financial officer and received "a lot of information" not otherwise available was removed as class representative). Moreover, Grace rejected the unique trading defense argument as to other plaintiffs where it was based solely on their connections to the corporate defendant without proof that they received non-public information. Id. at 168.[39]

In short, notwithstanding the State Group's unsupported contention that the "unique

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39/ The other cases cited are equally irrelevant. In Kline v. Wolf, 88 F.R.D. 696, 699 (S.D.N.Y. 1981), the plaintiff was subject to a severe attack upon his credibility after the court found his deposition testimony to be "implausible" and specifically contradicted under oath by the plaintiff's own broker. In re Harcourt Brace Jovanovich, Inc. Sec. Litig., 838 F. Supp. 109 (S.D.N.Y. 1993), involved an appeal from an order of the Magistrate Judge granting defendants' request that the named plaintiffs produce certain documents. There was no finding of a unique defense.

defenses confronting the [FSBA] appear to be meritorious" (State Group Mem. at 11), there is simply not a shred of evidence to support the outlandish claims that the FSBA was privy to any inside information or that the FSBA's relationship with Alliance Capital subjects it to a unique defense "precluding the presumption of reliance that its afforded other class members by the fraud on the market doctrine." Id. As the court noted in Hallet v. Li & Fung, Ltd., No. 95 Civ. 8917 (JSM), 1997 U.S. Dist. LEXIS 15509 at * 7 (S.D.N.Y. October 6, 1997), "the court should not disqualify a named plaintiff based upon any groundless, far-fetched defense that the [movant] manages to articulate. Otherwise, no class action could ever be certified." (Citations omitted.) See also Modell v. Eliott Savings Bank, 139 F.R.D. 17, 22 (D. Mass. 1991) ("This court finds these [unique reliance defense] arguments to be without merit. The record fails to indicate that Modell acquired any inside information either directly or through his broker");[40] In re Cardizem CD Antitrust Litig., 200 F.R.D. 297, 306 (E.D. Mich. 2001) ("Defendants have not presented the Court with any [unique defenses] evidence . . ."); In re Ikon Office Solutions, Inc. Sec. Litig., 191 F.R.D. 457, 465 (E.D. Pa. 2000) (rejecting unique defenses argument because of, inter alia, "the lack of record evidence on this subject"). Thus, both the State Group's innuendo that "questions exist" concerning whether the FSBA relied on non-public information and the Regents' "threat" of unique defenses are insufficient to support a unique defenses argument in the class certification context, much less to rise to the level of "proof" required by the PSLRA to rebut the most adequate plaintiff presumption. See 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(a).

The FSBA's relationship with Alliance Capital and Alliance Capital's contacts with

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40/ The court made this finding notwithstanding that plaintiff Modell was a former employee of Merrill Lynch, the principal underwriter of the initial public offering at issue, and that his stockbroker was employed by Merrill Lynch at the time of the offering. 139 F.R.D. at 22.

Enron simply do not preclude reliance on the integrity of the market and do not render the FSBA's claims atypical. There is nothing in this record to suggest that Alliance Capital (or the FSBA) relied upon anything other than the same public filings, financial statements and releases that are now alleged to be fraudulent. See Menke Affidavit ¶ 4. Therefore, the State Group's and the Regents' arguments that the FSBA is subject to "unique defenses" because many of its shares were purchased through Alliance Capital should be rejected.

C. The FSBA's Purchases Following Partial Disclosure Do Not Make Its Claims Atypical

The Regents contend that the FSBA's claims are atypical of the claims of other class members because, following the partial disclosures of Enron's financial problems beginning October 16, 2001, the FSBA purchased 2.7 million Enron shares at lower prices. Regents Mem. at 24-27. However, the complaint filed on behalf of Amalgamated Bank, one of the Regents' original partners in seeking co-lead-plaintiff status, extended the Enron class period through November 27, 2001. Amalgamated Complaint ¶ 20. In that complaint it is alleged that Amalgamated's claims are typical of the claims of class members who purchased Enron stock at any time from October 19, 1998 through November 27, 2001, because all class members were similarly affected by defendants' wrongful conduct, i.e., stock inflation, in violation of federal law. Id. ¶ 22. And while acknowledging the negative revelations about Enron beginning in mid-October 2001, it is alleged that "even these disclosures did not apprise the market of the extent of Enron's misstatements, such that its stock continued to be artificially inflated." Id. ¶ 92. Thus, all of the FSBA's purchases are typical of the claims of the class as expressly defined by the Regents' own counsel.

Moreover, neither the State Group nor the Regents has shown with the requisite proof that the Court will be preoccupied with a defense that is uniquely applicable to the FSBA. Warren v. Reserve Fund, Inc., 728 F.2d at 747. Indeed, any attempt by defendants to rebut the presumption of reliance will apply to all class members who purchased after October 16, 2001. Therefore, this issue is typical to a substantial portion of the class members and does not constitute a unique defense. See Kalodner v. Michaels Stores, Inc., 172 F.R.D. 200, 206 (N.D. Tex. 1997).

The Regents' typicality argument also fails because it ignores the fact that the FSBA sustained $300 million in damages, or almost 90% of its total losses (more than double the Regents' claimed losses), from purchases of Enron stock before any of the partial disclosures on October 16, 2001. The fact that the FSBA continued to buy at the tail end of the class period, thereby sustaining an additional $35 million in damages, is consistent with the notion that the lower stock prices reflected the negative news, and that Enron's stock price would recover.[41] Who would continue to buy stock at prices ranging from $9 to $24 per share if such purchaser knew that the stock would plunge below $1 after the full extent of Enron's financial condition was revealed? See Basic, Inc. v. Levinson, 485 U.S. 224, 247 (1988) ("Who would knowingly roll the dice in a crooked crap game?"). There is not a shred of evidence that the FSBA did not rely on the integrity of the market price of Enron stock or defendants' misrepresentations at any

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[41] Indeed, the leading analysts covering Enron shared this widespread belief. See, e.g., October 23, 2001 Report of Richard Gross, Lehman Brothers ("investors should rustle up a little courage and aggressively buy the stock in the face of this torrent of unsettling news"); October 23, 2001 Report of Mark Easterbrook, Dain Rauscher Wessels ("We ardently suggest investors purchase the shares at current levels"); October 22, 2001 Report of Donato J. Eassey, Merrill Lynch Capital Markets ("seasoned investors who position for the long term should be rewarded"); and October 22, 2001 Report of William D. Hyer, CIBC World Market Equity Research (rating buy). These reports comprise Exhibit M.

time during the class period.

To rebut the presumption that a plaintiff relied on the integrity of the market price under the fraud on the market theory,[42] it must be shown that either the defendants' misrepresentations or omissions did not distort the market price of the stock, or that an individual plaintiff would have traded despite his knowledge of the misrepresentation. See Nathenson v. Zonagen, Inc., 267 F.3d 400, 414 (5th Cir. 2001) (citing Basic, 485 U.S. at 248); Kalodner v. Michaels Stores, Inc., 172 F.R.D. at 206 n.6.

Under Basic, the FSBA's typicality is confirmed by allegations that all class members during the class period purchased Enron securities at prices inflated by defendants' material misstatements and omissions. Thus, the fact that investors use different purchasing strategies and buy stock at different times during the class period, at prices which were influenced by a varying mix of public information, will not rebut the presumption of reliance under the fraud on the market theory. See, e.g., Danis v. USN Communications, Inc., 189 F.R.D. 391, 398 (N.D. Ill. 1999); Arakis, 1999 U.S. Dist. LEXIS 22246, at *42; Scholes v. Stone, McGuire & Benjamin, 143 F.R.D. 181, 185 (N.D. Ill. 1992); In re Scott Paper Co. Sec. Litig., 142 F.R.D. 611, 615 (E.D. Pa. 1992); In re Chase Manhattan Corp. Sec. Litig., No. 90 Civ. 6092, 1992 U.S. Dist. LEXIS 6896, at *3-4 (S.D.N.Y. May 12, 1992); Alfus v. Pyramid Technology Corp., 764 F. Supp. 598, 606 (N.D. Cal. 1991); Walsh v. Chittenden Corp., 798 F. Supp. 1043, 1055 (D. Vt. 1992).

In rejecting the same atypicality argument advanced here by the Regents, the Court in

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[42] The fraud on the market theory holds that in an efficient trading market, the stock price will reflect any material misstatements or omissions, and, accordingly, a stock purchaser who relies on that price is presumed to rely on the material misstatements or omissions. Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. Basic, 485 U.S. at 243-44.

USN Communications explained in language equally applicable to this case:

> But defendants respond that . . . [plaintiff] was speculating on "bad news" – he made these purchases while the stock's price declined in the face of negative reports concerning USN's operations and profitability in the hopes that the stock would later rise . . . However, the fact that [plaintiff] may have purchased on bad news does not preclude him from invoking the fraud on the market presumption or representing the plaintiff class. As put succinctly by another district court, "there is a fundamental difference between an investor's presumption that the market price will move [up] and the fact that the price was tainted by fraud." Moskowitz v. Lopp, 128 F.R.D. 624, 631 (E.D. Pa. 1989). Simply because [plaintiff] bought low in speculation that USN's stock price would later rise has no bearing on whether the prices at which he bought were influenced by defendants' fraud.

189 F.R.D. at 396.

The Arakis Court used similar reasoning in rejecting defendants' argument that plaintiff's "averaging down" strategy at the end of the class period rendered him atypical of other class members:

> Even if Aronson and Kray did engage in "averaging down" strategies, such strategies do not make their claims so atypical as to be unrepresentative of the shareholder class . . . Slight factual discrepancies between the claims of various plaintiffs are insufficient to bar class certification on the grounds of atypicality . . .
>
> * * *
>
> The court finds that, even if defendants' allegations concerning Kray's and Aronson's "averaging down" strategies are substantiated, the defenses available against these two representatives will not be so significant as to become the "focus of the litigation." Because Kray's and Aronson's causes of action arise from the same legal theory as that of the other class members and rely on identical factual allegations, their claims are sufficiently similar to those of other members to satisfy the requirements of typicality.

1999 U.S. Dist. LEXIS 22246, at *41-43 (citations omitted).[43] See also Armour v. Network Associates, 171 F. Supp. 2d at 1054 ("[T]he Bakers Pension Funds speculate that . . . the timing of Louisiana Teachers' stock purchases makes its claims susceptible to a defense based on any corrective disclosures issued by Network Associates prior to Louisiana Teachers' first purchase on December 6, 2000 . . . [But] the PSLRA requires "proof" that the presumptively most adequate plaintiff will not fairly and adequately protect the class or is subject to unique defenses").

Accordingly, there is no proof that FSBA is atypical based on its purchases near the end of the class period.

V. APPOINTMENT OF THE REGENTS AS LEAD PLAINTIFF WOULD RESULT IN THE TYPE OF LAWYER-DRIVEN LITIGATION THAT THE PSLRA WAS DESIGNED TO CURB

The circumstances surrounding the Regents' application to be appointed sole lead

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[43] The Regents' reliance on cases involving post-class-period purchases are not only inapposite, but, as Arakis demonstrates, also do not support the proposition that an investor's use of an "averaging down" strategy renders him atypical. See also In re Select Comfort Corp. Sec. Litig., 202 F.R.D. 598 (D. Minn. 2001) ("purchasing stock subsequent to a materially adverse disclosure, 'averaging down,' is a common technique used to decrease the average cost of an investment and which cannot be used to defeat a proposed class representative's typicality"). Id. at 607 n.12 (citing Antonson v. Robertson, 141 F.R.D. 501, 508 (D. Kan. 1991); Kronfeld v. Trans World Airlines, Inc., 104 F.R.D. 50, 53 n.4 (S.D.N.Y. 1984); and In re Adobe Sys., Inc. Sec. Litig., 139 F.R.D. 150, 155 (N.D. Cal. 1991)). Even the cases relied upon by the Regents so hold. Koenig v. Benson, 117 F.R.D. 330, 336 (E.D.N.Y. 1987), involved extensive trading not only after the disclosure of the fraud, but, unlike this case, even after the issuer went into bankruptcy. In Epstein v. American Reserve Corp., 79 C 4767, 1988 U.S. Dist. LEXIS 3382, at *14-15 (N.D. Ill. Apr. 20, 1988), the Court held that plaintiff could not invoke the fraud on the market theory and therefore was not entitled to the presumption of reliance. Similarly, Kovaleff v. Piano, 142 F.R.D. 406, 407 (S.D.N.Y. 1992), did not involve a fraud on the market claim under Rule 10b-5, but rather a prospectus claim under Section 11 of the Securities Act of 1933. Moreover, plaintiff had no recoverable damages for class period purchases because the units never fell below the $10 offering price.

plaintiff evidence client participation that is controlled by lawyers and not the reverse – the very abuse that the PSLRA sought to reform. That is made clear by Milberg Weiss' client – and former lead-plaintiff applicant – Deutsche Asset Management, which states it was withdrawing in deference to a coalition of the Regents and certain members of the State Group because its lawyers told them that it would be the best thing to do. That declaration is evidence that the lawyers are making the decisions, not the client. The PSLRA was enacted in part to do away with such lawyer-controlled litigation. See Waste Management, 128 F. Supp. 2d at 431.[44]

The other lead plaintiff applicants learned for the first time that Milberg Weiss, counsel to the Regents, had shuffled its clients and was seeking appointment of the Regents as sole lead plaintiff through the brief that was served on January 22, after the date on which opposition papers were to be served.[45] No amended motion reflecting this change in position has ever been

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[44] As an initial matter, the Regents' application as a solo entity is untimely and in violation of the scheduling order entered by this Court. On January 8, 2002, Judge Rosenthal ordered that opposition papers were required to be served by fax on January 21, 2002. In disregard of that Order, the Regents served its "Opposition To The Competing Motions For Lead Plaintiff" on January 22, 2002. But, even then, service was not complete. The January 22 memorandum is replete with references to declarations which were not served on opposing counsel. Rather, the fax cover sheet accompanying the brief stated that "if you would like a copy of the 103-page declaration, please contact Mo Maloney." Exhibit J. Counsel for the FSBA and the NYC Funds made a written request for the declarations, which were delivered on January 23, 2002. Attached to the declarations are certificates of service falsely attesting that service of the declarations was made by fax on January 22, 2002.

[45] The Regents' and their counsel's disregard of the Court's Order cannot be viewed as inadvertent. In the Declaration of the Regents of the University of California dated January 21, 2002, Lloyd C. Lee, University Counsel, states as follows:

> On or about January 11, 2002, this case was transferred to the Honorable Melinda Harmon. I have been informed that Judge Harmon has written extensively regarding the appointment of lead plaintiff in securities class actions. . . . In light of the Court's interpretation of the PSLRA, The Regents concluded that it should seek the acquiescence of its co-movants to proceed alone with the motion to be appointed lead plaintiff.

filed.[46]

The papers recently filed by some of the entities that withdrew from the Regents group make three things clear: (1) Milberg Weiss told its other clients to withdraw, establishing that the group is lawyer-driven, not client-driven; (2) some of the clients that Milberg Weiss jettisoned departed under the understanding that the Regents were aligning with the State Group; and (3) the position of the Regents and Milberg Weiss that the single largest plaintiff is the most adequate plaintiff is newly formed, since as recently as the deadline for the opposition brief, Milberg Weiss was still trying to form an aggregation with the highest numbers, but failed in its attempts to do so. This Court should reject such a blatantly lawyer-driven application.

During the evening of January 23, 2002, counsel for the Regents served by fax a "Notice of Withdrawal of Lead Plaintiff Applicants," which formally disclosed the withdrawal of Amalgamated Bank, Deutsche Asset Management, HBK Investments and the Central States Pension Fund "in favor of the appointment of the regents of the University of California." Attached to the Notice are declarations of representatives of three of those four entities.[47] The January 21, 2002 declaration of Marcus Goehring on behalf of Deutsche Asset Management begins as follows:

Declaration at ¶ 3. Did it take the Regents and their counsel 11 days to determine that Waste Management suggested a change in the strategy of the lead plaintiff application of the Enron Institutional Investor Group? It defies credulity to believe that with respect to this significant motion, it took 11 days for a determination to be made. Clearly, as soon as the decision was made to change strategies in light of the reassignment of this case, the other lead plaintiff applicants were entitled to be notified of Milberg Weiss' shuffling of its client line-up.

[46] In stark contrast, the FSBA and the NYC Funds served their amended lead plaintiff motion on January 14, 2002, thus assuring that other lead plaintiff applicants would have sufficient time to respond in their January 21 opposition papers to the joint application.

[47] No submission has been made by Central States Pension Fund explaining its reasons for withdrawing, or even indicating that it knows it has been withdrawn.

> I, Marcus Goehring. . . submit this Declaration in withdrawal of its prior motion to be appointed lead plaintiff and <u>in support of the Amended Motion of the Regents of the University of California, the Retirement Systems of the States of Georgia, Ohio and Washington and Amalgamated Bank to be appointed lead plaintiff</u>.

(Emphasis added.) The declaration continues:

> [A]s explained by our legal counsel in the matter, it would be in the best interests of the class to withdraw in favor of the appointment of a small group of lead plaintiffs which have suffered significant losses. I am informed that the members of this lead plaintiff group are institutional investors. . . .

<u>See</u> Exhibit K. A second declaration was submitted on behalf of Deutsche Asset Management from its outside counsel. The counsel declaration, in conflict with the sworn statement of its client, states "[w]e advised [Deutsche Asset Management] of this Court's interpretation of the lead plaintiff provisions of the PSLRA and preference for a single strong lead plaintiff."

Thus, Deutsche Bank believed that it was withdrawing in favor of a group composed of members of an amalgamation of the State Group and two members of the now-disbanded Enron Institutional Investor Group. Clearly, Deutsche Bank was <u>not</u> aware that it was withdrawing in favor of the application of the Regents to be appointed the sole lead plaintiff. The conflicting statements of Deutsche Asset Management and its counsel establish that (1) changes were made to the structure of the lead plaintiff application without the full knowledge of at least one of Milberg Weiss' clients; and (2) the lawyers, not the clients, were making the decisions. The declarations do not evidence any thought or conclusion on behalf of these entities that the Regents would be the best-suited candidate among them to carry out the responsibilities of a lead plaintiff. Only this conclusion would demonstrate consideration of what is in the class' best interest. Otherwise, to simply bow out in favor of the group member who is most likely to get appointed, i.e., who has the largest loss among the group, highlights what the true objective of the group is, the appointment of their proposed counsel as lead counsel. Indeed, all the members of the group shared in common were their losses in Enron securities and their counsel.

This attempt to move clients in and out of lead plaintiff positions is just what the PSLRA sought to put an end to, and, standing alone, is sufficient reason for the Court to deny the Regents' application.[48]

For the last two months, Milberg Weiss, the Regents' proposed lead counsel, has purportedly been acting in this litigation on behalf of its client Amalgamated Bank. A complaint, asset-freeze application, and application to preserve Arthur Andersen documents were all filed in the name of Amalgamated Bank, some of those pleadings filed as recently as January 18, 2002. At the hearing on December 7, 2001 on the asset freeze motion, Mr. Lerach of Milberg Weiss introduced himself as "counsel for Amalgamated Bank." A lead plaintiff application was filed on December 21, 2001 on behalf of the "Enron Institutional Investor Group," with Amalgamated Bank listed as the first member. On January 15, 2002, after the case had been re-assigned to Judge Harmon, Milberg Weiss filed an Amended Certification on behalf of the lead plaintiff applicant Amalgamated Bank.

Suddenly, on January 22, 2002, Mr. Lerach advised the Court and the other parties that Amalgamated Bank was no longer a lead plaintiff applicant. Milberg Weiss' decision to jettison other clients to further its own interests in controlling this litigation was made abundantly clear by Amalgamated's own statement on its reasons for withdrawing:

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[48] See Switzenbaum v. Orbital Sciences Corp., 187 F.R.D. 246, 251 (E.D. Va. 1999) (lead plaintiff applicants who are unable to agree on who its members are held inadequate to protect the interests of the class).

> "This is something that we agreed to do so that Bill Lerach could become the lead attorney on the case," said Melissa Moye, chief economist for Amalgamated Bank, who reasoned that if stepping back was the only way to get Mr. Lerach selected to represent the whole class of shareholders, it would.

"Seeking Top Berth In Pursuit of Enron," The New York Times, Jan. 23, 2002 at C6 (Exhibit F). This startling admission is clear in its import – it is Milberg Weiss, and not its clients, that is driving this litigation. The recently configured Regents' application is therefore a product of lawyer-driven considerations, precisely the conduct Congress intended to curb when it enacted the PSLRA. Berger v. Compaq, 257 F.3d at 481. (The PSLRA mandates that "class representatives, and not lawyers, must direct and control the litigation.") See In re BankAmerica Sec. Litig., 95 F. Supp. 2d 1044, 1050 (E.D. Mo. 2000), aff'd, 263 F.3d 795 (8th Cir. 2001) ("Milberg Weiss's behavior in these cases are precisely the sort of lawyer-driven machinations the PSLRA was designed to prevent").

VI. THE MOTION OF PULSIFER & ASSOCIATES FOR APPOINTMENT AS A SEPARATE LEAD PLAINTIFF FOR A 7% NOTES CLASS SHOULD BE DENIED

The motion of Pulsifer & Associates ("Pulsifer") for appointment as a separate lead plaintiff (along with separate lead counsel) representing purchasers of the 7% Notes is premised on erroneous factual assumptions, as well as a host of inapposite and/or distinguishable case law.

A. The Funds Have Standing to Pursue All Claims Against All Defendants

Pulsifer's first erroneous assumption is that the motion before the Court is for certification of a class rather than for the appointment of a lead plaintiff. Even the cases Pulsifer cites acknowledge that the appropriate time to address this issue is at the class certification stage. In Tyco Int'l Ltd. Sec. Litig., M.D.L. No. 00-MD-1335-B, 2000 U.S. Dist. LEXIS 13390 (D.N.H. Aug. 17, 2000) (see Pulsifer Mem. at 10), the Court was faced with the same situation Pulsifer presents, namely, whether the creation of subclasses and appointment of a separate lead plaintiff and lead counsel was warranted at the lead plaintiff stage. The movant had argued that his claim "targets a distinct set of defendants, allows for a distinct remedy, depends on different evidence and contains a special standing requirement." Tyco, 2000 U.S. Dist. LEXIS 13390, at **24-25. In rejecting movant's position, the Tyco court stated:

> The relief that Landau's motion seeks – which could be characterized as the recognition either of multiple classes or of a subclass – does not appear to be contemplated under the PSLRA's lead plaintiff provisions. Rather, the statute seems to contemplate, even in consolidated actions such as this, the appointment of a lead plaintiff for a single purported plaintiff class. . . . It may prove difficult, however, to manage a class action composed of several distinct classes or subclasses with only a single lead plaintiff. . . . I decline to reach a final resolution of the issue now and reserve the right to reconsider it at the class certification stage if I determine that a separate § 20A subclass is necessary.

2000 U.S. Dist. LEXIS 13390, at *25, n.4 (emphasis added). The Tyco Court concluded that "there is no present need for separate leadership, and/or representation for the § 20A plaintiffs." Id. at *26. See also Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d at 1151 ("Their speculations about possible conflicts do not rebut the statutory presumption that one lead plaintiff can vigorously pursue all available causes of action against all possible defendants under all available legal theories" (emphasis added)). Indeed, the PSLRA expressly provides, "the court shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions," and not a separate class or subclass. 15 U.S.C. § 78u-4(a)(3)(B)(ii). There is no statutory authority to support appointing a lead plaintiff of a proposed subclass at the lead plaintiff stage. See Waste Management, 128 F. Supp. 2d at 432 (noting that conflicts alleged by proposed options subclass were premature at lead plaintiff stage of the litigation).[49]

In accordance with the provisions of the PSLRA, the Court should appoint the FSBA and the NYC Funds as co-lead plaintiffs for the entire action, and not appoint separate lead plaintiffs (and lead counsel) for proposed subclasses. Rather, the issue of subclasses should be deferred to the class certification stage. Tyco, 2000 U.S. Dist. LEXIS 13390, at *25; McKesson, 79 F. Supp. 2d at 1151.

B. The FSBA and the NYC Funds Have No Conflicts Arising Out of Ownership of Stock in Citigroup, Bank of America or Goldman Sachs

Pulsifer claims that the FSBA (and the NYC Funds) have conflicts of interest arising out of their ownership of shares of Citigroup, Inc., Bank of America Corporation and Goldman Sachs & Co., Inc., and, therefore, Pulsifer should be appointed as Lead Plaintiff of a 7% Notes subclass. Pulsifer's position is not well taken.

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[49] The ruling in In re Cendant Corp. Litig., 182 F.R.D. 144 (D.N.J. 1998) (relied on by Pulsifer) appointing a separate subclass lead plaintiff goes beyond the scope of the lead plaintiff provisions of the PSLRA and should not be relied on here. Pulsifer also relies on several cases which either were decided before the enactment of the PSLRA, or were not decided in the context of a lead plaintiff motion, in support of its argument that it is the only party with standing to assert claims arising out of the purchase of the 7% Notes. See Pulsifer Mem., at p. 6. None of these cases has any bearing on the issue of whether pursuant to the express provisions of the PSLRA, the FSBA and the NYC Funds should be appointed co-lead plaintiffs for the entire action.

Moreover, Pulsifer's reliance on unpublished decisions in In re Alcatel Alsthom Securities Litigation, (Finkel Aff., Exhibit B), In re Bank of America Securities Litigation (Finkel Aff., Exhibit C) and Norma J. Thurber v. Mattel, Inc. (Finkel Aff., Exhibit D), to support the proposition that subclasses can be established at the lead plaintiff stage, is unpersuasive because these Orders were unopposed or based on the submission of counsel.

1. Because Citigroup and Bank of America Were Not Underwriters of the 7% Notes Offering, the Funds' Equity Positions in Such Entities are Irrelevant

Citigroup and Bank of America were not underwriters of the 7% Notes offering. Rather, their corporate affiliates, Salomon Smith Barney, Inc. (a subsidiary of Citigroup) and Banc of America Securities, LLC (a subsidiary of Bank of America) were two of the underwriters on that offering. Pulsifer does not provide any authority for the proposition that owning an equity interest in the corporate parent of a defendant creates a conflict with respect to claims against that defendant. The fact that neither the FSBA nor the NYC Funds has a direct equity interest in two of the underwriters renders any claim of conflict of interest with respect to those underwriters unavailing. Indeed, in In re Frontier Ins. Group Sec. Litig., 172 F.R.D. 31, 44 (E.D.N.Y. 1997) (cited by Pulsifer at p. 12, n.12), the court held that being a current shareholder of a defendant does not disqualify a class member from being an adequate lead plaintiff. If owning shares in a defendant does not create a conflict, then a fortiori, owning shares in a corporate affiliate of a defendant cannot possibly create a conflict.

Moreover, Pulsifer admits that it owns shares in both Bank of America and Citigroup, worth a total of $360,000. Pulsifer Mem., at p. 12, n.12. If Pulsifer's argument is correct, namely that owning shares in a corporate parent of a defendant creates a conflict of interest, then its own motion becomes a self-defeating proposition, because it too would be conflicted and could not serve as a lead plaintiff of a 7% Notes subclass.

2. The Funds' Equity Positions in Goldman Sachs, Citigroup and Bank of America Do Not Create a Conflict of Interest

The potential liability of the underwriters of the 7% Notes offering will not have a material impact on the respective financial conditions of Citigroup, Bank of America or Goldman Sachs. According to filings with the SEC, Goldman Sachs had $302 billion in assets as of August 31, 2001. Its maximum exposure in this case from the 7% Notes offering is less than $111,250,000[50] (or less than 4 one-thousandths of one percent of its assets). Even assuming 100% liability, the impact on Goldman Sachs will not be material to its balance sheet, and the ultimate impact to the equity interests of the shareholders of Goldman Sachs will be negligible on a per share basis.[51]

Even if the Funds' holdings in the corporate parents of the underwriters were somehow relevant (which they are not for the reasons discussed above), the potential financial impact to the FSBA's and the NYC Funds' holdings in Citigroup and Bank of America arising out of claims against Salomon Smith Barney and Banc of America Securities is negligible. The maximum exposure to Salomon Smith Barney and Banc of America Securities is less than $55,625,000 each.[52] Thus, the maximum impact on their respective corporate parents (assuming 100% liability) is some portion of that number. Given that Citigroup and Bank of America reported in filings with the SEC that they had assets of $1.07 trillion and $640.1 billion respectively (both as of 9/30/01), even a judgment representing 100% liability to their subsidiaries will not have a material impact on their respective balance sheets, or on the equity interests of their respective shareholders.

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[50] Goldman Sachs underwrote one-half of the 7% Notes offering. Its maximum exposure is equal to its share of the offering, less the sale price of the Notes. 15 U.S.C. § 77k(e).

[51] As of January 22, 2002, Goldman Sachs had 478.5 million shares outstanding.

[52] Salomon Smith Barney and Banc of America Securities each underwrote one-quarter of the 7% Notes offering. Their maximum exposure is equal to their share of the offering, less the sale price the Notes. 15 U.S.C. § 77k(e).

Moreover, the FSBA and the NYC Funds have stated repeatedly that they are committed to this litigation. Counsel for the FSBA has advised counsel for Pulsifer that these equity holdings will have no impact on the prosecution of this litigation. See M. Pucillo's letter of January 25, 2002 to Tom Shapiro (Exhibit L).

Accordingly, Pulsifer has not come forward with the requisite "proof" (see 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(a)) establishing that the FSBA and the NYC Funds have an actual conflict of interest which precludes them from acting as co-lead plaintiffs on behalf of all class members, including purchasers of the 7% Notes.

VII. APPOINTING SEPARATE LEAD PLAINTIFFS FOR PROPOSED SUBCLASSES IS UNWARRANTED AT THIS STAGE OF THE LITIGATION

In addition to Pulsifer, the following movants seek to be appointed as lead plaintiffs to represent proposed subclasses in this litigation: (A) JMG/TQA, to represent a subclass comprised of purchasers of six different types of Enron debt securities; (B) Staro Asset Management ("Staro"), to represent a distinct Enron "debt securities class"; and (C) the Proposed Preferred Purchaser Group ("PPPG"), to represent a subclass of purchasers of Enron preferred stock (collectively, the "Niche Applicants").[53] At this stage of the litigation, there is no basis for

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[53] Based upon this Court's guidance in Waste Management, Archdiocese of Milwaukee Supporting Fund ("Archdiocese") contends that it does not seek to represent a subclass of debt purchasers at this time. Archdiocese Mem. at 7 (citing Waste Management, 128 F. Supp. 2d at 432). Instead, Archdiocese contends that it should be appointed as a lead plaintiff in this consolidated action because it is a "pure" holder of Enron debt securities. Archdiocese Mem. at 7. Archdiocese, however, claims to have suffered a Class Period loss of approximately $70,000, which removes Archdiocese from consideration to serve as a lead plaintiff in this litigation. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(bb) (most adequate plaintiff, inter alia, has "the largest financial interest in the relief sought by the class"). For the same reason, neither Private Asset Management ($10.3 million loss) nor the Local 710 Pension Fund ($2.5 million loss) is the most adequate plaintiff to direct this litigation. Id.

creating subclasses.[54] Rather, the segregation of claims that the Niche Applicants urge would unnecessarily fragment this litigation, burden this Court's resources, and dilute the class' recovery. See In re Orbital Sciences Corp. Sec. Litig., 188 F.R.D. 237, 239-40 (E.D. Va. 1999).[55]

The Funds suffered losses in both Enron equity and debt securities, and will therefore adequately represent the interests of the Class Period purchasers of all Enron securities.[56] For this reason, creating separate subclasses with separate lead plaintiffs is unwarranted. See Waste Management, 128 F. Supp. 2d at 432 (noting that appointment of options subclass at lead plaintiff appointment stage of litigation was premature). See also In re MicroStrategy, Inc. Sec. Litig., 110 F. Supp. 2d 427, 440 (E.D. Va. 2000) (issue of subclasses or classes represented by separate counsel properly addressed after lead plaintiff determination).

Moreover, as the Funds have previously noted, the PSLRA mandates the appointment of one lead plaintiff for all claims presented in a consolidated action. 15 U.S.C. §§ 78u-4(a)(3)(B)(ii), 77z-1(a)(3)(B)(ii) (as soon as practicable after decision on motion to consolidate is rendered, "court should appoint the most adequate plaintiff for the consolidated actions") (emphasis added). In their various opposition memoranda, the Niche Applicants have not presented the requisite proof that the Funds either (i) will not fairly and adequately protect the interests of the

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[54] The issue of subclasses should instead be examined at the class certification stage of this litigation. See Section VI of this Memorandum supra.

[55] The Funds note that the Davidson Group, which suffered a class period loss of approximately $100,000, is not in contention for appointment as lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(iii). The Funds have refuted the Davidson Group's argument that this Court should appoint individual investors to serve as lead plaintiff in the Funds' Opposition Memorandum, and incorporate that argument by reference. Funds' Opposition Memorandum at 31-32.

[56] As discussed in Section IV of this Memorandum, no competing movant has offered proof that the Funds will not adequately represent the interests of the class.

class or (ii) are subject to unique defenses that render the Funds incapable of adequately representing the class.[57] For this reason, the Niche Applicants' "speculations about possible conflicts do not rebut the statutory presumption" that a single lead plaintiff or cohesive lead plaintiff group will adequately represent the interests of the purchasers of all Enron securities. Aronson v. McKesson HBOC, Inc., 79 F. Supp. 2d at 1151. See also In re Lucent Techs., Inc. Sec. Litig., 194 F.R.D. 137, 150 (D.N.J. 2000) (no requirement that claims of all class members be identical for class to be certified). Thus, the Court should not appoint additional lead plaintiffs or separate lead plaintiffs for proposed subclasses.

CONCLUSION

From the hundreds of pages of materials submitted to this Court on the lead plaintiffs issue, two salient facts stand out: (1) the FSBA and the NYC Funds are presumptively the most adequate plaintiffs to represent the class; and (2) no proof has been submitted to rebut that presumption.

Accordingly, the motion of the FSBA and the NYC Funds to be appointed as co-lead plaintiffs should be approved in all respects.

Dated: January 28, 2002

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57 The PPPG's argument that this Court should create a separate subclass for purchasers of Enron preferred stock is premised almost entirely upon pre-PSLRA law. See PPPG Opposition Memorandum at 4-12. The cases upon which the PPPG relies do not negate the propriety of determining the subclass issue at the class certification stage of the litigation. Further, the only post-PSLRA decision that the PPPG cites is distinguishable. See In re Nanophase Tech. Corp. Litig., No. 98-C-3450, U.S. Dist. LEXIS 16171 (N.D. Ill. Sept. 30, 1999). In Nanophase, the court created subclasses because the case involved mutually inconsistent classes involving public investors and nonpublic investors.

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CERTIFICATE OF SERVICE

Pursuant to Rule 5(b) of the F.R.C.P., I hereby certify that a true and correct copy of the above and foregoing document was served on all counsel of record by electronic facsimile on this the 28th day of January, 2002, with an additional copy served by United States mail, First Class delivery.

Charles R. Parker

Charles R. Parker

by John Rohan